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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO DAMIAN,

Defendant and Appellant.

G044308

(Super. Ct. No. C85522)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez, Eric Swenson and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal follows Marco Damian's fourth trial for crimes arising from a deadly shooting spree he aided and abetted back in 1991. However, it is not so much what happened at Damian's fourth trial as what happened at his third trial that provides the basis for his appeal. Due to a charging error in his third trial, Damian was convicted not only of second degree murder, but also two counts of aggravated assault he had previously been acquitted of. On appeal to this court, we found the error harmless because the trial court ultimately struck those two counts. But on federal review, the Ninth Circuit Court of Appeals determined the error warranted the reversal of Damian's murder conviction. Damian was then retried and convicted for a fourth time of committing murder in the second degree. He contends his retrial was fundamentally unfair for a variety of reasons, but we disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of February 12, 1991, Westside La Habra gang members Emilia Cenicerros, Gabriela Maldonado and Cesar Vasquez went out looking for trouble. First, they stole a car, and then they then picked up Damian and began driving around La Habra in search of rival gang members. Vasquez had a sawed-off shotgun with him and said he wanted to "blast" members of the Monos gang for smashing in his car windows on a prior occasion.

While cruising around in Monos-claimed territory, the group pulled up to pedestrians Angela Orozco and Alma Alvarado, who belonged to a female clique of the Monos. Vasquez insulted the women and asked them about their gang affiliation, and Cenicerros wanted to get out and fight them. However, before she could do so, Vasquez pointed his gun at them, and they ran away. Damian's group drove on.

A few minutes later, James Gomez heard a gunshot outside his home on nearby Pacific Avenue. When he went outside to see what was going on, he saw gunshot damage to his neighbor's truck. The shot went through the truck and penetrated a wall of Gomez's garage.

A short time after that, a nearby residence on Fifth Avenue was also targeted by gunfire. Then, a few minutes later, Leo Huicochea was gunned down in an alley near the intersection of Bedford and Stearns. He suffered a single shotgun blast to the head that left him mortally wounded.

As it turned out, Huicochea was the boyfriend of one of Cenicerros' distant cousins. He belonged to a gang called Ward Street, which sometimes associated with the Monos gang. Explaining the shooting, Cenicerros testified Damian was driving the car when they spotted Huicochea in the alley. Cenicerros told Vasquez she wanted to scare Huicochea, so at Vasquez's request, Damian pulled within about 30 feet of him. As he did, Vasquez leaned out the passenger window and fired the shotgun. The shot hit Huicochea in the eye, killing him on the spot.

Afterwards, Damian called his girlfriend and told her about it. He also confessed his involvement when the police arrested him in connection with the shooting. He, Cenicerros and Maldonado all admitted they drove around in the car with Vasquez shooting at rival gang members and their houses.

As set forth in the Ninth Circuit's opinion, here is how the case transpired through Damian's first three trials: "In 1991, Damian was tried on six counts: one count of murder in the second degree, two counts of assault with a firearm, two counts of shooting at an inhabited dwelling, and one count of shooting at an unoccupied vehicle. Damian was at times a passenger in the car involved and at times the driver, although it was agreed that he was not the person who fired the shots from the moving vehicle. At trial, Damian was found guilty, on an aiding and abetting or conspiracy theory, of second degree murder, of shooting at an unoccupied vehicle, and of one count of shooting at an inhabited dwelling. He was acquitted of the other count of shooting at an inhabited dwelling and of one count of assault; the other count of assault was reduced to a charge of brandishing a deadly weapon, and he was convicted of that lesser charge. His convictions were subsequently reversed due to the admission of an involuntary

confession. [(*People v. Cenicerros, et al.* (July 30, 1993, G012169 & G013105) [nonpub. opn.].)] Damian was retried in 1994, on the basis of a second amended information, charging only those four offenses of which he had been convicted; this time, he was found guilty as to all four. His conviction was again reversed, however, due to the erroneous admission of the confession. [(*People v. Damian* (June 27, 1995, G015794) [nonpub. opn.].)] In 1996, Damian was tried a third time. At the third trial, the prosecution mistakenly used the first information, which included all six original counts. The jury found Damian guilty of all six. At sentencing, the trial court discovered the problem and struck the convictions on the counts of which Damian had previously been acquitted.” (*Damian v. Vaughn* (9th Cir. 2006) 186 Fed.Appx. 775, 777.)

Damian then once again appealed to this court. He argued his double jeopardy and due process rights were violated by the inclusion of the charges of which he had been acquitted, and his attorney was ineffective for failing to raise the issue of double jeopardy at trial. We rejected these claims for lack of prejudice. Finding the evidence presented at trial would have been the same even without the jeopardy-barred counts, and due to the fact the court struck the jeopardy-barred convictions, we determined any error in including the jeopardy-barred charges was harmless beyond a reasonable doubt. We therefore affirmed the judgment. (*People v. Damian* (Feb. 16, 1999, G021073) [nonpub. opn.].)

Damian then pursued his claims in federal court. Although the district court denied his habeas petition, the Ninth Circuit found Damian’s attack on his murder conviction to be well taken. The court ruled:

“The clearly established federal law applicable to this case is *Morris v. Mathews*, 475 U.S. 237, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986), in which the Supreme Court held that when an unbarred offense is tried with a jeopardy-barred charge, ‘a new trial is required only when the defendant shows a reliable inference of prejudice.’ *Id.* at 246, 106 S.Ct. 1032. In other words, the error will be deemed reversible only when the

defendant can demonstrate a ‘reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense.’ *Id.* at 246-47, 106 S.Ct. 1032 (citing *Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for the proposition that a “‘reasonable probability’” is a probability sufficient to undermine confidence in the outcome’).

“To obtain a conviction of second degree murder — as distinguished from manslaughter — the state was required to prove that Damian’s conduct was sufficient to demonstrate malice. The state argued at Damian’s third trial that the required element of malice could be implied from Damian’s participation in an escalating criminal ‘rampage,’ of which the natural and probable consequence was murder. In doing so, it repeatedly referred to and relied heavily upon the charges of assault. Had the jeopardy-barred charges of assault been properly excluded from the third trial, the state would have been precluded from making its primary argument. While it may be possible to infer implied malice in the context of assault, an offense that requires the intent to commit violent injury, it is much more difficult (if not impossible) to infer malice from the offense of brandishing a deadly weapon, which entails only the drawing or exhibiting of a deadly weapon in a ‘rude, angry, or threatening manner.’ *Compare* Cal. Pen.Code § 240 (assault) *with* Cal. Pen.Code § 417 (brandishing a weapon). Without the jeopardy-barred counts of assault, there is a reasonable probability, sufficient to undermine our confidence in the outcome, that the state would not, on the record it made, have been able to prove the necessary element of malice and that Damian would not have been convicted of second degree murder.

“Because the state court considered only whether the same underlying evidence would have been admissible absent the presence of the jeopardy-barred counts and failed to recognize the critical role of the jeopardy-barred assault charges in supporting the finding of implied malice, we further determine that its conclusion that there was no double jeopardy violation with respect to the murder conviction was

contrary to the reasoning and result required by federal law. In contrast, there is not a reasonable probability that Damian would not have been convicted of the three lesser counts that were not ultimately set aside; therefore, we affirm the district court's denial of the habeas petition in part and reverse and remand only with respect to his conviction for second degree murder.

“Although counsel's failure to raise the issue of double jeopardy clearly constituted deficient conduct under *Strickland*, we need not reach Damian's ineffective assistance of counsel claim, given our reversal in part on the basis of double jeopardy and our conclusion that Damian could not demonstrate prejudice as to the counts on which we affirm the district court's denial of his petition. Accordingly, we affirm the district court's denial of Damian's habeas petition in part, and reverse and remand for issuance of the writ with respect to the conviction for second degree murder.” (*Damian v. Vaughn*, *supra*, 186 Fed.Appx. at pp. 777-779, fns. omitted.)

In accordance with the Ninth Circuit's ruling, the district court issued a writ of habeas corpus so as to vacate Damian's conviction for second degree murder. Over Damian's objection, he was then retried on the murder charge for a fourth time. The jury convicted him of second degree murder and found true the enhancement allegation he was vicariously armed during that offense. Thereupon, the court sentenced him to 15 years to life in prison, plus 1 year for the enhancement.

I

Damian contends he was improperly retried for murder because the Ninth Circuit determined that retrial was barred by double jeopardy principles. We disagree.

Although the Ninth Circuit found reversible error in the prosecution's reliance on the jeopardy-barred charges of assault to prove implied malice, it did not say anything to suggest Damian could not be retried. In fact, the case the Ninth Circuit relied on in reversing Damian's murder conviction, *Morris v. Mathews*, *supra*, 475 U.S. 237 at p. 246, clearly indicates the proper remedy for a Fifth Amendment violation resulting

from the prosecution's reliance on a jeopardy-barred charge *is* a new trial on the nonjeopardy-barred offense. (*Id.* at p. 246.) Thus, the trial court did not contravene the Ninth Circuit's ruling by allowing Damian's fourth trial to go forward.

II

Damian also contends the trial court violated his right to due process and fundamental fairness by allowing the prosecution to introduce evidence regarding the jeopardy-barred counts. Again, we disagree.

As explained above, Damian was acquitted in his first trial of assaulting Alvarado and Orozco with a firearm (counts 4 and 5) and shooting at Gomez's dwelling (count 6).¹ However, that does not mean evidence pertaining to those counts was inadmissible in his latest trial. To the contrary, the law is well established that due process does not preclude the use of testimony relating to an alleged crime that the defendant had previously been acquitted of committing. (*Dowling v. United States* (1990) 493 U.S. 342.) Although such evidence has the potential to prejudice the jury, its admission will be upheld where it is circumstantially valuable in proving the defendant's guilt and the jury is properly instructed as to its permissible use. (*Ibid.*)

Damian does not dispute the evidence regarding the incident with Alvarado and Orozco and the shooting of Gomez's dwelling was relevant to prove such issues as intent, motive, knowledge and the existence of a common plan. (Evid. Code, § 1101, subd. (b) [allowing evidence of uncharged acts to be admitted for these purposes].) Nonetheless, he argues its admission was error because it raised the specter he had committed the crime of assault with a firearm. In so arguing, Damian correctly points out that the presence of the jeopardy-barred assault counts in his third trial was the very reason the Ninth Circuit ordered his murder conviction to be reversed. But that's because

¹ The acquittal on the assault count involving Alvarado is implied because the jury convicted Damian of the lesser offense of brandishing a deadly weapon as to her. (*Damian v. Vaughan, supra*, 186 Fed.Appx. at p. 778, fn. 3.)

the prosecution “repeatedly referred to and relied heavily upon the *charges of assault*. Had the jeopardy-barred *charges of assault* been properly excluded from the third trial, the state would have been precluded from making its primary argument.” (*Damian v. Vaughn*, *supra*, 186 Fed.Appx. at p. 778, italics added and fn. omitted.)

In the present case, however, Damian was not charged with assault. And although the trial court admitted evidence he and his companions confronted Alvarado and Orozco with a firearm, the court and the parties treated that incident as one involving the brandishing of a deadly weapon, not assault with a firearm. This is important because it prevented the prosecution from relying on the “charges of assault” to prove implied malice, which was the Ninth Circuit’s chief criticism of the third trial. Instead, the prosecution properly referred to the incident involving Alvarado and Orozco as one involving the brandishing of a deadly weapon. Therefore, admitting evidence of that incident did not run afoul of the Ninth Circuit’s ruling, nor was it unduly prejudicial. Because the evidence was properly characterized as a brandishing offense, and because it was indisputably relevant to the issues of intent, motive, etc., the trial court did not err in allowing the jury to consider it.

III

In a related argument, Damian claims the trial court should have at least instructed the jury he had previously been acquitted of assaulting Alvarado and Orozco and shooting at Gomez’s dwelling. Damian’s trial counsel did not ask the court to so instruct the jury. However, following the verdict, Damian retained a private attorney who moved for a new trial on the basis trial counsel was ineffective for failing to do so. At the motion hearing, trial counsel testified he did not ask the court to inform the jury about the prior assault charges because he did not want to draw attention to them. Finding this to be “a sensible tactical decision,” the court determined trial counsel was not ineffective, and, in any event, informing the jury Damian had been acquitted of the assault charges

and shooting at Gomez's dwelling would not have "changed the result at all." Therefore, the court denied the new trial motion.

Generally, "if a trial court permits the prosecution to present evidence that the defendant committed one or more similar offenses for which he or she is not charged in the current prosecution, the trial court must allow the defense to present evidence of the defendant's acquittal, if any, of such crimes [Citations.]" (*People v. Mullens* (2004) 119 Cal.App.4th 648, 664-665.) The purpose of allowing such evidence is to assist the jury in assessing the significance of the other offense or offenses. (*People v. Griffin* (1967) 66 Cal.2d 459, 465.)

In this case, though, it would not have done much good to inform the jury Damian had been acquitted of assaulting Alvarado and Orozco with a firearm because the alleged assaults occurred during the very same confrontation from which his brandishing conviction arose. Despite the acquittals, the jury would still have known a firearm was menacingly displayed during that confrontation, and the jury would have been allowed to consider that evidence, along with all of the other circumstances, in determining whether Damian was guilty of murder. Again, it is important to remember the confrontation was never actually described by the parties or the court as one involving an assault with a firearm. Rather, it was properly characterized as a brandishing offense only. Therefore, the problem identified by the Ninth Circuit — of allowing the prosecutor to argue implied malice *based on the assault charges* — did not repeat itself.

By parity of reasoning, reversal is not required simply because the jury was never informed Damian had been acquitted of shooting at Gomez's dwelling. Factually speaking, that count was virtually inseparable from the charge relating to Gomez's neighbor. Indeed, the same bullet that struck the neighbor's truck penetrated the wall of Gomez's garage. Because Damian was convicted of shooting at the truck, and because the evidence of that shooting was properly admitted into evidence, it would not have helped the defense much to tell the jury Damian was acquitted of shooting at Gomez's

dwelling. As a matter of fact, it could have prejudiced the defense by leading the jury to believe Damian got away with something he quite obviously had a hand in. Trial counsel's tactical decision was eminently reasonable.

All things considered, it is not reasonably probable Damian would have achieved a more favorable result had the jury been informed he had previously been acquitted of assaulting Alvarado and Orozco with a firearm and shooting at Gomez's dwelling. No grounds for reversal have been shown.

IV

Lastly, Damian contends it was unfair to try him for a fourth time because it enabled the prosecution to utilize everything it learned in the prior three trials to obtain a conviction against him. He argues, "Most obviously, the prosecution had the benefit of 20/20 hindsight and was able to perfect its case over the course of four trials to avoid previous mistakes and capitalize on that knowledge to hone its strategy." We do not believe this deprived Damian of a fair trial.

Damian points to two aspects of his trial as being particularly troublesome. First, unlike in his first three trials, the prosecution presented testimony from a gang expert to explain why Damian and his companions may have wanted to kill Huicochea. Damian asserts this unfairly allowed the prosecution to argue implied malice "from a different angle." But actually, the gang motive was raised in his prior trials, albeit without expert testimony. And although the gang expert testified there was bad blood between Damian's gang and the Monos gang, Huicochea actually belonged to an outfit called Ward Street. Ward Street and Monos did have some ties at the time of the shooting. But as the expert explained, their relationship was not always good, and therefore he was dubious about whether killing a Ward Street member would constitute revenge against the Monos. Suffice it to say, the expert's testimony did not do much in terms of supporting the prosecution's theory the shooting was gang related, nor did it render the trial fundamentally unfair.

In arguing his trial was “inequitable,” Damian also points to the testimony of prosecution witness Emilia Cenicerros, who, due to her participation in the shooting, was still serving a prison sentence at the time of trial. Damian correctly notes that, in exchange for Cenicerros’ promise to testify truthfully, the prosecution informed the parole board of her cooperation in the case. However, by the time Cenicerros testified in the present case, she had already been granted a release date by the board. And although Damian assails her testimony as being inconsistent in some respects, that is hardly surprising, given that she was asked to recall details of a shooting that happened two decades ago.

Viewing the record as a whole, we do not believe the alleged errors cited by Damian, whether considered individually or cumulatively, warrant a reversal of the judgment. Although we are sympathetic to the fact he has been required to undergo multiple trials, that inconvenience was a necessary consequence of our system of appellate review, a system which worked to Damian’s advantage three times.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.